In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-54

JAMES L. KEENER,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

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COMES NOW, the Respondent by and through their counsel, Assistant Attorney General for the State of Kansas, Roger N. Walter, and for their response to the submitted Petition for a Writ of Certiorari present the following brief in opposition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those statutes cited by the petitioner, respondent submits these additional statutory provisions for the Court's consideration.

Kansas Statutes Annotated, Section 22-4507
(Supp. 1977)

"Same; entitlement to compensation and reimbursement of expenses for services to indigents; standards; claims, approval; filing with administrator; payment; proration of payments, when; rules. An attorney who performs services for an indigent person, as provided by this act, shall at the conclusion of such service or any part thereof be entitled to compensation for his or her services and to be reimbursed for expenses reasonably incurred by such person in performing such services. Compensation for services shall be paid in accordance with standards of panels to aid indigent defendants. *Claims for compensation and reimbursement shall be certified by the claimant and approved by the judge of the district court before whom the service was performed,* or, in the case of proceedings in the court of appeals, by the chief judge of the court of appeals and in the case of proceedings in the supreme court, by the departmental justice for the department in which the appeal originated. *Each claim shall be supported by a written statement, specifying in detail the time expended, the services rendered, the expenses incurred in connection with the case and any other compensation or reimbursement received.* When properly certified and approved, such claims for compensation and reimbursement shall be filed in the office of the judicial administrator of the courts who shall authorize payment from the aid to indigent defendants fund.

Should it appear to the board of supervisors that the balance in such fund together with anticipated revenues will be insufficient in any fiscal year to pay in full claims filed and reasonably anticipated to be

filed in such year, the board is authorized to adopt a formula for prorating the payment of pending and anticipated claims so as to ensure an equitable allocation of the available balance among those persons having or filing valid claims against the fund.

The supreme court may adopt rules governing the filing, processing and payment of such claims." [Emphasis supplied.]

Rules of the Kansas Supreme Court
220 Kan. cviii

Rule 403

APPROVAL OF CLAIM:—DETERMINING REASONABLENESS—REQUEST FOR REVIEW. (a) Claims for services performed at the magistrate or county court level in cases terminating in such courts shall bear the approval of the magistrate or county judge.

(b) Claims for services performed in one case at both the magistrate or county court level and at the district court level shall be approved by the district judge.

(c) Claims for services performed in appealing a case to the Supreme Court shall be approved by the departmental justice for the department in which the appeal originated.

(d) In approving said claims the magistrate, judge or justice shall examine the same and determine the reasonableness thereof, giving effect to any standards established by the Board of Supervisors of Panels. In determining the reasonableness of said claims the magistrate, judge or justice shall consider the nature and difficulty of the issues involved in the case and the

time reasonably necessary to prepare and present the same. The magistrate, judge or justice, in the exercise of his discretion, may reduce the amount of any claim submitted to him before approving the same.

(e) When any claim is adjusted and approved in part only by the magistrate, county judge or district judge the claim as approved shall be returned to the claimant for filing. Upon filing such claim with the judicial administrator the claimant may request a review of the claim by the Board of Supervisors of Panels as provided in Rule No. 404.

Rule 404

CLAIMS—REVIEW BY BOARD OF SUPERVISORS OF PANELS. The judicial administrator on his own initiative may and at the request of any claimant he shall withhold payment of any claim filed for services performed on the magistrate, county and district court level until such claim is reviewed by the Board of Supervisors of Panels. Upon review the Board of Supervisors of Panels shall determine the amount of claim to be paid, taking into consideration the time and effort reasonably justified by the nature and difficulty of the issues involved in the case and the time reasonably necessary to prepare and present the same, and such decision by the Board shall be final.

STATEMENT OF THE CASE

A. Statement of Facts.

Petitioner's statement of the case, insofar as it related objective fact and not biased characterization of those facts, is substantially correct.

Petitioner was confined in a federal penitentiary on a plea of guilty to bank robbery and kidnapping. (R. Vol. II, p. 20, Exhibit E). Two Kansas counties filed identical requests for custody of the petitioner under Article IV of the Interstate Agreement on Detainers. On May 9, 1975, the Sedgwick County Attorney requested temporary custody of the petitioner. (R. Vol. II, pp. 14-15). On August 6, 1975, the Harvey County Attorney likewise requested custody for prosecution of related charges. (R. Vol. II, pp. 7-8). On August 8, 1975, the Federal Warden offered temporary custody to Harvey County. (R. Vol. II, pp. 17-18). On August 11, 1975, the Harvey County Attorney accepted the offer of custody. (R. Vol. II, pp. 1-3). The record does not reflect whether Sedgwick County ever accepted custody. (R. Vol. IV, p. 95).

The petitioner arrived in Sedgwick County pursuant to the above arrangements on September 20, 1975. (R. Vol. IV, p. 72). On September 22, 1975, the petitioner was taken to Harvey County, arraigned on pending charges before the District Court, and returned to Sedgwick County. (R. Vol. IV, pp. 17 & 72).

On November 10, 1975, the petitioner plead guilty to all the pending charges in Sedgwick County, and was sentenced. (R. Vol. III, pp. 1-2, Vol. IV, p. 42). On December 3, 1975, on motion of the District Attorney's office of Sedgwick County, the District Court of Sedgwick County entered an order authorizing the return of the petitioner to federal custody. This order was entered without notice to the defendant, or to Harvey County. (R. Vol. II, p. 11). On December 9, 1975, the defendant was transported back to federal custody. (R. Vol. II, p. 13, Vol. IV, p. 73).

Harvey County authorities did not learn of the petitioner's return till after it was effected. These authorities subsequently sought and obtained the petitioner's return

on January 20, 1976. (R. Vol. IV, pp. 34 & 73). Defense counsel in a Motion to Dismiss argued that this prosecution was barred by Article IV (c) & (e) of the Interstate Agreement on Detainers. K.S.A. 22-4401. (R. Vol. V, pp. 40-47). The motion was denied. The petitioner was eventually convicted.

The events subsequent to this are as recounted in the petitioner's statement of the case.

Exception, however, is taken with counsel for the petitioner's subtle insertion of biased characterizations and conclusions throughout the factual account of the case's history of which, to the best of counsel's knowledge, are not supported in the record by sworn testimony or competent evidence. Specifically, respondent objects to the references and innuendoes within pp. 8-9 of the petitioner's brief, that state authorities obtained the petitioner's return in January of 1976 through knowingly implementing defective proceedings and with knowledge that his return was contrary to law.

B. How the Federal Question Arose.

On appeal of his criminal conviction to the Kansas Supreme Court, petitioner contested the validity of his conviction in light of the language of subsection (c) and (e) of Article IV of the Interstate Agreement on Detainers. In addition counsel for the petitioner asserted two issues regarding the state procedures for compensating court-appointed attorneys.

Counsel for petitioner was not reimbursed in the full amount for his submitted fees to the Judicial Administrator for the Supreme Court of the State of Kansas. K.S.A. 22-4507 (1977 Supp.) and Kansas Supreme Court Rules 403 and 404 provide: 1) that compensation be made according to standards adopted by the state board of supervisors of panel to aid indigent defendants, 2) the board is specifically authorized to reduce payment for submitted fees on a pro rata basis if anticipated revenue for any year is insufficient to pay full claims, and 3) the judicial administrator may request a review of the reasonableness of the amount of any claim by the board and a corresponding adjustment.

Also, on appeal petitioner challenged the recoupment procedures under K.S.A. 22-4513 (1977 Supp.) whereby a demand was made upon him for the amount expended in payment for his court-appointed counsel and a judgment was entered against him for that amount on August 1, 1977.

REASONS FOR NOT GRANTING THE WRIT

I. Petitioner's Counsel's Assertion of a Constitutional Right to Compensation at Full Amount of Submitted Claim to State Judicial Administrator for Court-Appointed Services Is Frivolous, and Petitioner Lacks Standing to Assert Such a Claim.

Applicable state law, K.S.A. 22-4507 (1977 Supp.), grants the board of supervisors of the state aid to indigent defendants panel a certain flexibility in the payment of claims submitted by court-appointed counsel. The statute authorizes the board to set standards and limits to the payment of such claims and considering the balance and anticipated revenues to allocate less than full payment on a pro rata basis if revenues for any year are insufficient to pay the full amount of submitted claims.

Further, section 22-4507 empowers the Supreme Court of Kansas to adopt rules governing the processing and payment of such claims. The State Supreme Court had adopted such rules (i.e., Rules 403, 404). These rules pro-

vide for the detailed review of the amount and reasonableness of the submitted claim and require the approval of the judge (of the court) in which the services were performed. The judge or magistrate is given authority to reduce the claim. Further, upon the judicial administrator's or claimant's request, the reasonableness of the submitted payment may be reviewed and adjusted by the board of supervisors.

In the face of this clear statutory language counsel for the petitioner presents the novel claim that there exists a constitutional right to compensation for his court-appointed services at a certain level, which he has unilaterally determined and submitted for payment. Although it is not entirely clear, it seems to be his contention that compensation at this level is not necessarily due in all cases, but only those cases where the original prosecution was "unlawful." Counsel apparently concludes that the original prosecution was unlawful because a trial court's denial of his motion to dismiss was reversed on appeal, the state appellate court accepting his asserted construction of the involved statutory provisions.

Respondent is not only confused as to the source of this alleged constitutional right, but also as to whom this right inures. This is an appeal from a state criminal conviction, reversed on appeal to the Kansas Supreme Court. Despite reversal of his conviction, petitioner, the criminal defendant, makes application to this Court to reverse certain ancillary conclusions of the Kansas Supreme Court dealing with the payment and recoupment of fees of court-appointed counsel.

Here the asserted right is to payment for court-appointed services at a specified level. It seems clear if such a right exists, its benefits flow not to the petitioner but to his counsel. It is axiomatic that a constituitonal

issue cannot be treated by a court merely because it is raised by a party requesting resolution. The petitioner seeking relief must demonstrate the practice in question affects a personal interest. *United States* v. *Richardson*, 418 U.S. 103 (1969). Petitioners must not only show they are personally injured by the contested practice, but also that this injury is real and immediate. *Schlesinger* v. *Reservists*, 418 U.S. 208 (1974); *Golden* v. *Zuicker*, 394 U.S. 103 (1969).

Here the petitioner, a criminal defendant, has no immediate personal interest in the amount at which his court-appointed counsel is compensated. This is an issue between his counsel and the state authorities. An asserted right to compensation at a specific level for court-appointed services, however attenuated, is personal to the attorney. A criminal defendant on direct appeal of his criminal conviction has no standing to assert such a right. If counsel for defendant wishes to raise this issue he should do so in 42 U.S.C. §1983, asserted in his own interest either in the federal or state courts.

Nor should petitioner be heard to contend that this right to compensation is personal to his right to counsel under the Sixth Amendment. Any connection between the asserted right to compensation and Sixth Amendment is too remote to establish a concrete personal interest. Clearly the issue of compensation under Kansas procedures occurs after the service is provided and disputes as to the proper level of compensation after the fact could not in any way affect the petitioner's right to the services. It is equally certain that premised on this state practice the petitioner may not assert any chilling effect on his right to counsel in the future. One may not assert a constitutional claim on the premise that one may be injuriously affected in the future. *O'Shea* v. *Littleton*, 414

U.S. 488 (1974). Further, any hesitancy of future counsel to accept appointment over the uncertainty as to his expected level of compensation, one, is likely not to be found as sufficient reason to be excused from this responsibility imposed by a court and the legal profession, and two, in any event would not affect the defendant's absolute right to ultimately be represented by counsel.

It is curious to note the almost total absence of case authority presented in support of the petitioner's contention in this regard. The reason is simple, there is none. The asserted interest is a tenuous abstraction completely without support in decisional law and constitutional theory. The issue was cogently analyzed in the lower court opinion of the Kansas Supreme Court:

> "The thrust of defendant's argument is that he has a constitutional right to have his defense counsel adequately compensated, particularly in a case where the prosecution was 'unlawful.' We find no support for the argument.
>
> It is the moral and ethical obligation of the bar to make representation available to the public. (See Canon 2, Code of Professional Responsibility, 220 Kan. ex.) Quite often, fulfillment of that obligation involves the representation of a client, particularly a criminal defendant, for little or no remuneration. Enactment of K.S.A. 22-4501, *et seq.*, has served to relieve some of the hardships involved in fulfilling an attorney's obligation to provide legal representation to the public; but it has not cancelled the attorney's ethical responsibility to provide representation without compensation if necessary. Court appointed counsel has no constitutional right to be compensated, much less to receive full and adequate compensation which may have been received if the same time had been spent on a fee-paying client's problems. (See, *United States* v. *Dillon*, 346 F.2d 633 [9th Cir. 1965].)" *State* v. *Keener*, 224 Kan. 100, 102 (1978).

There is no support in law for the petitioner's theory of constitutional relief and it is unlikely he would prevail on the merits. Further, respondent contends regardless of the substantive merits of his contention the petitioner lacks standing to assert the alleged interest.

II. The Kansas Recoupment Procedures and the Decision of the Kansas Supreme Court in This Action Are in Accord With Applicable Decisions of This Court and Lower Federal Decisions.

Petitioner argues the recoupment practice under K.S.A. 22-4513 (1977 Supp.) is unconstitutional. This argument is premised on two grounds. First, petitioner contends that recoupment practice is unconstitutional in his particular case, because his original prosecution was "unlawful." Secondly, petitioner asserts that under the due process clause he is entitled to a hearing prior to the entry of judgment. Neither are persuasive.

The practice of recouping from criminal defendants attorney's fees and other legal expenses provided at state expense because of indigency is common among the various states, though the statutory procedures vary widely. [See *James* v. *Strange*, 407 U.S. 128, at 132 (1972)]. Some allow the repayment of such expense to be a condition of sentence or probation, others such as Florida deem the debt to be a perpetual lien against the defendant's real and personal property. Some specifically assess costs only against convicted defendants, although the majority apply the recoupment provisions regardless of the outcome on the merits of the criminal prosecution.

Kansas recoupment procedures have experienced an eventful history within the courts. In 1971 a three-judge Federal District Court panel declared the existing recoupment provisions under K.S.A. 22-4513 unconstitutional. *Strange* v. *James*, 323 F. Supp. 1230 (1971). The sweeping language of that opinion indicated that any attempt to compel indigent defendants to repay the state for legal services provided would impermissibly chill the right to counsel under the Sixth Amendment and the Supreme Court decision of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

On appeal to the United States Supreme Court, a unanimous court held that there was no denial of right to counsel in the strictest sense, and expressly refused to treat the general question of whether recoupment statutes making repayment obligatory impermissibly infringe on the right to counsel, finding the statute unconstitutional on the separate grounds. The court held that failure of the state to afford indigent defendants the same protections afforded other civil judgment debtors violated the strictures of the Equal Protection Clause. It expressly declined to make any pronouncement on the validity of recoupment statutes generally. *James* v. *Strange*, 407 U.S. 128 (1972).

In 1974, the U.S. Supreme Court again addressed the issue of recoupment, in passing on the validity of Oregon procedures under Oregon Rev. Statutes §161.665. At this time, however, the Court considered the Sixth Amendment question forming the basis of the lower court decision in *Strange* v. *James, supra.* The Court expressly rejected the reasoning of the three judge panel in that case. *Fuller* v. *Oregon*, 417 U.S. 40 (1974).

The Oregon statutes provided [Oregon Rev. Statutes §161.665] that a convicted defendant provided legal services at the state expense due to indigency may be obli-

gated to reimburse the state if such a condition is imposed in sentencing the defendant or as a condition of probation. Payment was to be made according to any terms specified by the court and if no terms are specified the payment was due forthwith. If the defendant refused to pay or failed to make any good faith effort, he was subject to contempt charges which provided for incarceration upon order of the court for up to one day for each $25, but not exceeding one year or for revocation of probation. In addition, the statute conditioned the authority of the court to require such recoupment upon a determination that the defendant was able to pay, and also provided procedures for the defendant to petition the court for a remission of payment obligations if they imposed manifest hardship. The petitioner was obligated to repay attorney's fees and expenses incurred by a criminal investigator as condition to a five-year probation and placement in a work-release pro am.

This court in *Fuller* concluded that various state and federal district court opinions holding the imposition of an obligation to repay placed upon an indigent defendant to impermissibly chill the Sixth Amendment right to counsel were "wide of the constitutional mark". *Fuller* at 52. The court observed that *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) required only that indigent defendants be afforded an opportunity for counsel even though they do not have the present financial ability to retain one. It further concluded that procedures, such as the one outlined in the Oregon statutes, which provide a present absolute right to court-appointed counsel but may in the future impose an obligation to repay the state for expenses incurred in providing legal assistance, adequately comply with these requirements and do not infringe on the defendant's constitutional right to counsel. *Fuller* at 53.

The *Fuller* decision also addressed the equal protection issues raised by state recoupment procedures. The court held that as long as exemptions accorded other civil judgment debtors generally are provided defendants from whom recoupment is sought, the procedures are free from any equal protection infirmities.

Since the *Fuller* decision, a number of state and federal court decisions have affirmed the validity of a variety of recoupment procedures. *Smith* v. *Lees,* 431 F. Supp. 923 (1977); *United States* v. *American Theatre Corporation,* 526 F.2d 48 (1975); *People* v. *Amor,* 12 Cal. 3d 20, 523 P.2d 1173 (1974); *Washington* v. *Barklund,* 87 Wash. 2d 814, 557 P.2d 314 (1977). As mentioned previously, recoupment procedures vary widely from state to state, and courts applying *Fuller* have grafted various requirements onto the decision in particular circumstances as a prerequisite to a holding of validity.

Regardless of these varying decisions, the law regarding recoupment practices post *Fuller* could be appropriately summarized as follows: 1) recoupment practice does not violate the Sixth Amendment right to counsel as long as an indigent defendant in lieu of prosecution is given the present, absolute right to counsel, 2) such procedures do not offend equal protection of the law if the indigent has the same exemptions available to other civil judgment debtors, and 3) the procedures must be essentially fair and not impose a manifest hardship on an indigent defendant without adequate resources to pay.

The recoupment scheme contemplated by the Kansas statutes admittedly is of a different genre than Oregon procedures approved in *Fuller.* The Oregon procedures made recoupment a discretionary act of the trial court judge in imposing criminal sentence. Repayment could be made a condition of probation or a direct part of the

sentence, such as a fine. If a defendant refused to or failed to pay, he or she would be subject to contempt charges which provided for incarceration for up to one day for each $25. In these circumstances the Oregon statutes conditioned the authority of the trial court to impose recoupment upon a determination that the defendant was able to pay, and also provided procedures for the defendant to petition the court for a remission of payment obligations if they imposed manifest hardship.

The Kansas procedures represent an entirely different approach although in substance they provide equal if not greater protections than the Oregon procedures. Recoupment under the Kansas scheme is essentially a civil debt collection procedure and not primarily an adjunct to the criminal sentencing authority of the trial court.

In this light, the court should be apprised of the existence of a separate Kansas statute dealing with the sentencing authority of trial court judges authorizing the judge to impose repayment of such expenditures as a condition of probation. K.S.A. §21-4610(k). The constitutionality of K.S.A. §21-4610(k) was not raised as an issue in this case. Nor is plaintiff subject to the terms of that statute since he is not serving a term of probation. Therefore, plaintiff would have no standing to challenge the effect of K.S.A. §21-4610(k). Moreover, should a revocation of probation be attempted under K.S.A. §21-4610(k) for failure to reimburse the State, such a determination would be preceded by the full panoply of procedural safeguards set forth in K.S.A. §22-3716.

The procedure must be viewed in its totality to appreciate its reasonableness. Clearly petitioner is in error when he argues that judgment under this practice is entered without the intervention or supervision of a judicial officer. Submission of fees by court-appointed counsel

must in the first instance be reviewed by the trial court judge or other judicial officer before whom the services were rendered. The procedures provided for an automatic entry of judgment upon submission to the clerk of the local court by the judicial administrator of an abstract of judgment sixty days after a demand has been served on the defendant. K.S.A. 22-4507. As contemplated by Kansas Supreme Court Rule 403, this judge or magistrate reviews these claims as to their authenticity, reasonableness, and amount and has full authority to reduce the amount of counsel's submitted claim. Further, the judicial administrator, upon his own initiative may request the Board of Supervisors to review the amount of any submitted claim. Once judgment is entered the indigent defendant has all the exemptions and protections available any other civil judgment debtor, impoverished or otherwise.

Thus, recoupment in the first instance is conditioned on the trial judge's determination that services were provided and the submitted charges are reasonable. The defendant is thereby notified of his obligation for the incurred expenses. Should the indigent defendant lack the resources to pay the amount, the matter would progress in normal fashion to the entry of civil judgment against the defendant upon the debt owed. At this point the defendant is on equal footing with any debtor who has judgment entered on a legitimate debt. If he lacks the financial resources to satisfy the judgment, just as an impoverished civil debtor, he will be guarded from overreaching and manifest hardship by the full panoply of exemptions available judgment debtors generally under the Kansas Code of Civil Procedure. See *Stroinski* v. *Office of Public Defender*, 134 N.J.Super. 21, 338 A.2d 202, 209 (1975). This adequately complies with the requirement of *Fuller*. Certainly there is no reason in the law or specifically the Constitution why indigency should preclude the entry of judgment on a bona fide civil debt.

The Kansas legislature, exercising its general powers of government, has determined that though an indigent defendant charged be given a present absolute right to representation, he is obligated to the State for the cost of such services. Contrary to popular expectation, these services are not free, and there exists no compelling reason in law or public policy why such services should be borne exclusively by the public treasury where the beneficiary has adequate resources to bear the expense. The existence of the debt cannot be controverted, since the trial court judge approves the authenticity of the service and reasonableness of the fee charged. Thus the state has established streamlined procedures apart from the ordinary legal process for the collection of the debt. The statutes, of various states, including Kansas, are replete with examples of such summary legal procedures applicable in specific circumstances. Enforcement of the judgment would be impossible unless the defendant has sufficient resources. If he does he should not be heard to complain since his assertion of indigency under such circumstances is not warranted.

III. The Kansas Recoupment Procedures Adequately Comply With the Requirements of Due Process.

The petitioner contends that Kansas recoupment practice offends the dictates of the due process clause in that it allows the entry of civil judgment against the defendant without a prior hearing. In support of this contention he sights. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); and *North Georgia Finishing Co.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975). His reliance on this authority is misplaced, and his assertion goes well beyond the holdings of these and other decisions of this Court.

The above line of authority holds only that a debtor must be afforded a hearing prior to or in close proximity

to the seizure of any property, and does not support any absolute right under due process to a hearing prior to judgment in all instances. See *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974).

Indeed cases which have addressed the precise issue raised by the petitioner have held that summary recoupment procedures need not necessarily grant a defendant the right to hearing before the amount owed becomes enforceable as a judgment lien. *U. S.* v. *Durka*, 490 F.2d 478 (7th Cir. 1973); *Stroinski* v. *Office of Public Defender*, 134 N.J.Super. 21, 338 A.2d 202, 209 (1975).

Here the procedures grant notice of existence of the debt sixty days prior to any administrative action taken by the judicial administrator. As the Kansas Supreme Court has indicated implicit within this sixty day delay is the right to object to the judicial administrator. The judicial administrator has authority to request review of the claim by the board of supervisors. As mentioned previously the existence of the debt can hardly be disputed, since the judge before whom the services were rendered must verify the authenticity and reasonableness of counsel's claim prior to payment by the state.

After the amount paid out is entered as a judgment against the defendant, the right to a hearing is present when the state attempts to collect the judgment by garnishment or execution. K.S.A. 60-718(c), K.S.A. 60-259 (f), and K.S.A. 60-260(b). Under section 60-260(b) generally, and 60-260(b)(6) specifically the defendant has the right to assert a request for relief from the operation of any final judgment for any reason which he claims should justify such an action. This presumably would authorize the defendant to present any grounds for relief not theretofore asserted.

Petitioner further asserts a due process flaw in the recoupment procedures in that they create an irrebuttable

presumption which assumes a fact to be universally true which is not necessarily so, and that there are reasonable alternative means of decision making. See *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974).

First, it is not entirely accurate to identify the operation of questioned recoupment procedures as an irrebuttable presumption. The facts allegedly presumed, the existence of the services and reasonableness of the charge, are not conclusively presumed but require an independent finding to that effect by the trial court judge. On these findings and payment of the fee, Kansas law conclusively imposes the obligation of repayment. Any assumptions inherent in this process are reasonable and not arbitrary or capricious. There seems little question under the procedures that the services were provided and the charges were approved. Under such circumstances the Kansas legislature has determined the indigent defendant will be obligated to repay the amount expended, though enforcement of the state's debt will be delayed till sufficient resources in the form of non-exempt property are available.

Petitioner would cry that fairness demands when an indigent defendant is acquitted the state bear the brunt of the expenses it has unlawfully imposed. Such an appeal is not compelling in logic or policy. The Kansas legislature has determined that indigent defendants, should they acquire sufficient resources in the future, should be on no different footing than ordinary defendants.

If indigent defendants accrue a right to free legal services, upon acquittal, regardless of future ability to pay, under his rationale should not a like privilege be afforded ordinary defendants who are acquitted. Clearly acquittal will not excuse a defendant from an obligation to pay his privately retained counsel, and there is no compelling reason in law or equity why it should therefore excuse an obligation to repay the State for court-appointed counsel.

CONCLUSION

The Kansas legislature has elected to condition the state service of providing court-appointed counsel on the imposition of an obligation to repay. The recoupment of such expenses is a legitimate concern of government, and it has not been implemented in a manner which is arbitrary or capricious. Pursuant to *Fuller* it seems beyond contention that such procedures do not impermissibly burden the right to counsel and do not offend equal protection. Further, the Kansas procedures effectively prohibit any enforcement of the obligation in any circumstance which would impose a manifest hardship.

Petitioner's assertion of a pressing need for this Court's intervention premised on a conflict of federal authority is without merit. There is no conflict in authority. Federal cases cited as evidence of such, are cases largely interpreting the Federal recoupment statute, and not constitutional parameters to state recoupment schemes.

For the reasons set forth in the body of the argument, the Kansas recoupment scheme adequately complies with this Court's definitive pronouncement on this issue in *Fuller* v. *Oregon, supra.* There are no constitutional infirmities, due process or otherwise, and this Court should in its sound discretion deny this request for review.

Respectfully submitted,

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